No. 2591.

United States Circuit Court

of Appeals

For the Ninth District

SMITH-POWERS LOGGING COMPANY, a corporation, and C. A. SMITH LUMBER and MANUFACTURING COMPANY, a corporation.
Appellants

vs.

E. W. BERNITT and VICTOR WITTICK,
Appellees

Reply APPELLANT'S BRIEF

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APPELLANT'S BRIEF

The questions arising on this appeal are almost entirely questions of fact. The law is well settled and easily applied. As we view it the following material questions arise for the consideration of this court on appeal:

1. Did appellees sustain their burden of showing that the original agreement made the raftsmen joint owners or co-tenants with E. B. Dean & Co. in the real property involved in this suit?

2. Did appellees sustain their burden of showing that the original agreement gave the raftsmen any IRREVOCABLE right, license or easement?

3. If they have sustained that burden was such an agreement valid in view of the Oregon Statute of Frauds requiring an agreement not to be performed within one year to be in writing, and requiring any agreement for the leasing of a longer period than one year, of real property, or for the sale of real property or any interest therein, to be in writing?

4. If they have sustained that burden and the agreement was not within the Statute of Frauds, was not C. A. Smith a subsequent purchaser in good faith and for a valuable consideration of the same real property, and entitled to the protection afforded him by Section 7129 of Lord's Oregon Laws, requiring conveyances of real property to be recorded?

5. If they have sustained that burden and the agreement was not within the Statute of Frauds, and C. A. Smith is not entitled to

the protection of the recording act, *were appellees ousted of possession in* 1908 *or* 1909?

6. If they have sustained that burden and neither the Statute of Frauds nor the recording act apply, were or were not appellants entitled to contribution from appellees for their share of repairing the boom in accordance with the United States government's requirements?

An examination of appellee's brief discloses that the theory on which the suit was brought and tried, as shown by the allegations of the complaint, and the proofs adduced in support thereof, has been wholly abandoned by appellees and an entirely new theory adopted on this appeal.

The complaint is clearly founded on *a co-partnership agreement* and *joint ownership.*

Paragraph IV of the complaint (T. p. 3) alleges that the parties entered into a "partnership agreement." Paragraph V begins with the words "That in pursuance of said co-partnership agreement." Paragraph VI begins "That under the said partnership agreement." The same theory appears throughout the complaint and particularly in paragraph XXIV (p. 13) which begins as follows:

> "That under and by virtue of said *partnership agreement* and by virtue of their *joint ownership* these plaintiffs are each entitled," etc.

But on this appeal this theory seems entirely abandoned for the opening paragraph of the so-called "statement of the case" in appellee's brief asserts that:

> "This is a suit in equity between *tenants in common.*"

Where, how, or when the relationship of tenants in common arose is not pointed out, but that they were tenants in common seems to be a fact necessary to assert because the brief contains many cases applicable to tenants in common. Volumes have been written on the distinction between joint tenancy and tenancy in common, but it is futile to submit authorities for at page 17 of appellees brief we find that appellees are neither joint owners or tenants in common, being there asserted:

> "So far as the ownership or the legal title to the land itself, these appellees make no claim except as to the *easement, the right, privilege or license,*" etc.

Then again at page 38 of the brief appellees state that:

> "While the original undertaking was unquestionably that of a partnership, the changes subsequently made in the ownership of the different fractional parts of the whole render it somewhat confusing as to how long it continued to exist, and where the doctrine of co-ownership and tenants in common should be applied."

We frankly confess that we find it more than "somewhat confusing" to follow the various and conflicting theories appellees advance. It is always more or less confusing to endeavor to erect a substantial and imposing edifice on a foundation of shifting sand. The trouble with appellees case is that it is impossible to point out in the record any testimony that establishes a starting point for a line of reasoning which logically followed out would reach the desired point. There is nothing to tie to. Taking the view of the testimony most favorable to appellees we must necessarily start with a violent presumption, i. e., that the arrangements between the original parties was such as to give the raftsmen a part ownership of the real property, or to give them an irrevocable license or easement, or some similar rights, and then by the process of reasoning in a circle find that they are entitled to recover for the value of such rights. The court below hurdles all these apparently troublesome questions by saying that it is unnecessary to determine what the rights of appellees are, then finding that they have rights and then awarding damages; and counsel for appellees attempt to take the same short cut. This may be the easiest way to dispose of a troublesome case, but it is not law and it is not equity. The appellees were the plaintiffs below and on them devolves the burden of establishing that they acquired and still retain clearly defined rights of a kind and in a method recognized by law.

That we must start with this violent presumption

is shown, not only by the testimony and proven facts, but by the statement thereof in the second and third paragraphs of appellees brief. In order to fix a starting point for this court on appeal let us examine the facts concerning the *original arrangement* as stated in this portion of appellees brief. This statement of facts, which we quote from their brief (italics ours) is as follows:

> "That in 1881 E. B. Dean, David Wilcox and C. H. Merchant were carrying on and conducting a sawmill business upon Coos Bay, in Oregon, under the firm name of E. B. Dean & Co.; that they desired to made *certain arrangements* with men carrying on rafting business so that the logs for their sawmills coming down on the waters of the various tributaries of Coos Bay could be properly and economically handled; that George Wulff and David Young were in the business of rafting logs, and William Klahn and E. W. Bernitt were also in the same business; that pursuant to this idea C. H. Merchant, one of the partners, induced George Wulff and David Young *to contribute to the construction of certain log booms,* in the complaint described, for the catching of these saw logs and timber; that the land for the most part upon which these booms were constructed belonged to the partnership of E. B. Dean & Co.; that C. H. Merchant also tried to induce William Klahn and

E. W. Bernitt to go into the business with them, but at first they hesitated and E. B. Dean & Co., together with George Wulff and David Young, commenced the construction of what is described in the testimony as the Upper Boom; that before said Upper Boom was completed however, William Klahn and E. W. Bernitt consented and did go in and *became interested in the enterprise;* that E. B. Dean & Co. was to, and did, furnish the land and one-half of the cost of building the booms, and the other parties were to, and did, pay for half of the construction of the booms, and were to, and did, operate and take care of them; that E. B. Dean & Co. was to, and did, pay 25 cents per thousand feet board measure, for saw logs and 1-8th of a cent per lineal foot for piles, for its own timber caught and handled through the boom, and the boom was also used to catch the saw logs and timber of other parties at the same price.

"That the following method of handling the business was adopted: The logs and timber caught in the boom for Dean & Company were credited to a Boom Account kept by E. B. Dean & Co. on its books, and the cost of keeping up the boom, such as labor and material for repairing it was charged to this account. Ordinarily at the end of each rafting

season a balance would be struck and if the upkeep of the boom had not consumed the entire earnings of the boom for logs caught belonging to E. B. Dean & Co., the difference was divided among these *parties*, one-half was retained by E. B. Dean & Company, and one-half was placed to the credit of the rafters on their individual accounts on the books of E. B. Dean & Co. If the earnings of the boom from the logs and timber caught for E. B. Dean & Co. were not sufficient to pay for the upkeep of the boom, the deficiency was charged, one-half to E. B. Dean & Co., and one-half to the rafters, who at the beginning of the agreement were George Wulff, David Young, William Klahn and E. W. Bernitt; that the earnings of the boom from other logs and timber caught therein for outside parties were divided, E. B. Dean & Co. taking one-half and the rafters taking the other half, divided in proportion to their respective portions. *This was the original agreement.*" (Appellees Brief pages 2, 3 and 4.)

This, then, is the foundation on which appellees *must* build their case. This was the original agreement. Let us examine it carefully. It will be noted that there is not a word as to the *rafters* being entitled to any ownership in the property itself. There is nothing said about their becoming joint tenants or tenants in common. There is nothing said about

their becoming partners. There is nothing said about their having any *easement* or *irrevocable* license or rights, for the duration of the arrangements is not even attempted to be stated. Here is where we must indulge in our presumption. We must presume these essentials of appellees' case. We must presume that the rights of the rafters were irrevocable, that they were to continue "for all time," and in passing, if we presume this, the agreement would be void under the Oregon statute as pointed out in our main brief (page 26, 27). We must presume that the agreement was that the rafters were to become part owners of the real property, for the boom was a permanent improvement on land, and clearly was itself real property in the absence of an express agreement that it was to remain personal property. Here again, if we presume that the agreement operated to convey ownership in real property to the rafters, then it was void as to subsequent purchasers. (Appellants' brief, pp. 26 and 27.)

One who has the burden of proving the terms of a contract cannot ask the court to assume that the minds of the parties met on the very elements essential to make out his case. Appellees' case should stand or fall on the original agreement *as proven.*

A considerable portion of appellees' brief is devoted to a discussion of the various transfers between the different sets of raftsmen. These were all made without the knowledge or consent of the other raftsmen, and each one transferred whatever interest he

thought or claimed he had. Counsel for appellees seek to add to the original agreement by showing that some of these transfers attempted to convey an interest in the property itself. For instance at page 20 of appellees' brief attention is called to the bill of sale from Klahn to plaintiff, Bernitt, both of whom were parties to the original agreement. Counsel for appellees then say:

> "That this instrument clearly sets forth the understanding of these partners, of their respective interests, at a time when the matter was fresh in the minds and memories of all parties concerned, can hardly be controverted. It is not conceivable that Klahn and Bernitt would have that understanding, without all the parties knowing just what they claimed. E. W. Bernitt has continued all these years to hold and claim his interest in those booms *in conformity with that understanding expressed in the Bill of Sale.* (Exhibit No. 8.)

Need we point out the absurdity of such argument; that appelles are not claiming under any understanding between Klahn and Bernitt ;that any understanding between them is not binding on the other parties to the original agreement? Clearly if Bernitt claims his interest by virtue of that bill of sale, as stated by appellees' counsel, his case must fall. On the other hand if he rests his case on the original agreement between all the parties he cannot add to that agreement by any private agreement with Klahn. The

same rule applies to all the transfers between the raftsmen. And why is it necessary for appellees to rely on this bill of sale to show that the original parties to the agreement had some interest in the property itself? Bernitt was present and testified at the trial. Why did not he testify to that effect? That he did not so testify is shown in our main brief at pages 30, et seq. Nor did Wulff, the only other one of the original parties who testified at the trial. On the contrary Wulff's testimony clearly negatives the claims now made by appellees. In the face of the testimony of Bernitt and Wulff counsel for appellees are forced to bolster up their case by relying on title derived from the subsequent transfers between the individual raftsmen, of which transfers the other raftsmen and E. B. Dean & Co., the actual owners of the property, had no knowledge. Like the hen trying to hatch out houses and lots from a setting of door knobs, counsel for appellees seek to incubate from these bills of sale rights of ownership in the real property of E. B. Dean & Co. They don't know what breed they are, whether they are rights of joint tenants, tenants in common, partners, owners of an easement, or irrevocable licenses, but they are satisfied they must be some kind of rights of ownership in real property.

Their case is also attempted to be aided by what amounts to testimony by appellees' counsel throughout their brief. For instance, at page 10 of their brief they say:

"The understanding being that E. B. Dean

> & Co was to furnish the land and pay one half of the cost of the construction of the boom, and said Wulff and Young the other half, *and each was to have a half interest therein.*"

But no reference is made to the testimony supporting this statement of one of the vital points of the case, and we challenge counsel for appellees to point out any such evidence. Nor is there anything in the record to support the statement at page 17 of appellees' brief, that

> "The testimony and record thus far outlines and *establishes the fact* that there was a partnership or at least *joint ownership* of these booms in the beginning, and this testimony has in no manner been controverted by the appellants."

We unqualifiedly assert that there is no evidence, competent or otherwise, in the record to support this statement. *The fact, if it be a fact, that the rafters were charged on the books of E. B. Dean & Co. with a part of the cost of construction of the boom, does not prove that the rafters were joint owners or cotenants with E. B. Dean & Co.* They might have been, and probably were, willing to bear a part of the cost of construction in return for the rafting and booming privileges, whatever they were, which they were to enjoy. What the arrangement really was is not to be presumed but proven by appellees and this they have wholly failed to do.

We respectfully submit, therefore, that questions numbered "1" and "2" at the beginning of this reply brief, should be answered in the negative.

Questions "3" and "4" as to the effect of the statute of frauds and the recording act, have been fully covered in our main brief at pages 25 to 29 inclusive.

The next vital matter to be considered is that covered by question numbered "5" as follows:

> "If they have sustained that burden and the agreement was not within the Statute of Frauds, and C. A. Smith is not entitled to the protection of the recording act, *were appellees ousted of possession in* 1908 *or* 1909?"

In our main brief, pages 70 to 74 inclusive, we analyzed the testimony on this point, and pointed out that by the testimony of the appellee Bernitt himself, the appellees, if ever ousted, were ousted in 1908. We also pointed out the other evidence showing that the Smith-Powers Company was in exclusive possession after 1908; that Willis Varney on behalf of that company took possession in July, 1908, and continued until Christmas, 1908, when he turned over possession to W. J. Ingram.

In appellees' brief, however, it is repeatedly asserted that appellees were not ousted until the spring of 1909, but no reference is made, and none could be made, to evidence in the record supporting this assertion. What is ouster?

> "Ouster is not necessarily a physical eviction. It may exist if there be no possession of

> or under the adverse claimant, attended with such circumstances as to evidence a claim of exclusive right and title."
> 38 Cyc. 25, and cases cited.

Here we have exclusive possession by the Smith-Powers Company in July, 1908, and after that time, and a claim by them made in a statement to Bernitt by Bernitt's own testimony that they claimed exclusive right. All the elements of ouster are here proven by one of the appellees himself, as well as by appellants' witnesses, and none of this is controverted.

If appellees were ever ousted, in was in 1908 *and not in* 1909 *as found by the court below and asserted by counsel for appellees.*

In their brief appellees assert, as did the court below, that the complaint alleged the date of ouster to be in June, 1909, and that the answer does not deny this. The answer did deny this. It alleged (paragraph 9, Tr. p. 54) that C. A. Smith and Smith-Powers Logging Company purchased the property in July, 1907, and at that time entered into the possession thereof and ever since have been in the *open, continued and exclusive control* thereof, and the answer further alleges (Tr. p. 58) that the plaintiffs *were permitted to operate the boom until the fifteenth day of October,* 1908, *at which time the defendants informed the plaintiffs that thereafter the Smith-Powers Logging Company would take exclusive charge of said boom and premises.* Clearly, the position taken by the court below and by counsel for

appellees in their brief, that the answer admitted the date of ouster to be June, 1909, is untenable, for the answer expressly set forth exclusive possession after July, 1907, and exclusive possession *and operation* after October, 1908, under a claim of right to do so, which claim was communicated to appellees at that time.

Appellees cite several cases to support the proposition that the relationship between E. B. Dean & Co. and the rafters was that of partners. In our main brief we endeavored to show that the evidence did not support this contention. In addition we wish to submit that the cases defining partnership are usually cases where it is necessary for the court to determine the question as fixing liability to *third persons.* That question does not arise in this case. Counsel for appellees treat the question as an abstract proposition of law and no doubt if we were simply trying to define "partnership" the cases cited would be in point. In the case at bar, however, appellees are claiming as co-partners or co-tenants with appellants, and base their claims on an oral agreement. When the question of rights and liabilities arise *inter sese*, as in this case, mere definitions of partnership have no particular bearing. The vital questions to be determined are: *What was the contract between these parties and did that agreement contemplate that appellees were to be part owners of the property itself? Was it a mere working arrangement to operate the boom*

on a profit sharing basis? How long was the arrangement to continue? Was there any irrevocable right, license or easement granted?

After citing these cases appellees' counsel apparently concede that the relationship was not that of co-partners, although that is the theory set forth in the complaint, for at page 41 of their brief they say:

> *"While the appellees and the corporation Smith-Powers Logging Company may not be partners, yet under appellees' claim of ownership they are at least co-owners.*

But on what basis does their "claim of ownership" rest? They are not co-owners because they claim ownership.

And on pages 42 and 43 of their brief we find still another theory advanced:

> "The appellees' theory of the case is this. Although there may not have been any agreement that the land itself should become partnership property, or that appellees or their predecessors were to acquire any legal title thereto, yet by reason of their entering upon the land at the solicitation of the members of the firm of E. B. Dean & Company, the owners, and making valuable and permanent improvements thereon with their knowledge and consent, and joint participation, *that was sufficient to give them a right, license or easement in the land to continue to use and occupy the same with their boom and maintain it and*

enjoy the fruits, and share in their proper proportion with the other co-owners or partners.''

Here, it will be noticed, appellees frankly abandon all claim of rights based on a contract of partnership or otherwise, and rely on the fact that the raftsmen were charged on the books of E. B. Dean & Co., with a part of the cost of construction of the boom. Compare this theory with the allegations of the complaint. The system of preparing appellees' brief seems to have been to first find an imposing array of authorities, then to endeavor to distort the facts in this case to fit those cases, then to find another line of cases, more distortion, and so on to Q. E. D.

Now this is not a simple case of the raftsmen going on the property of E. B. Dean & Co. and erecting valuable and permanent improvements thereon. There was an agreement of some kind by which a boom was constructed and a portion of the cost of construction charged to the raftsmen, in return for which they were given a valuable privilege. That much may be considered as proven and that much only. As we said at the outset of this reply brief, appellees have wholly failed to sustain the burden of proof as to the terms of that agreement. The major part of plaintiff's foundation is a fabric of presumptions, intended to shift under the weight of each line of authorities which plaintiffs seek to have it sustain. It is therefore futile to endeavor to distinguish the authorities cited by appellees. The real

questions involved in this case are largly questions of fact and not of law.

Appellees brief goes on to say (p. 43):

> "As to whether they were partners with E. B. Dean & Co., or that firm's successors and assigns *is not material, because whatever* rights they may have had became vested and were acquiesced in and E. B. Dean & Company, through their *authorized* Receiver, and the Dean Lumber Company."

Here is still another theory, that of rights of ownership based on recognition and acquiescence by C. H. Merchant, as Receiver of E. B. Dean & Co., and by the Dean Lumber Company. Cases are cited which apparently fit that theory but the facts of this case do not. Let us re-examine these facts briefly. C. H. Merchant, one of the original "partners," was receiver for E. B. Dean & Co. He, as receiver, sold to Mr. Dillman, representing the Dean Lumber Company, all the property in question, including the boom itself. Appellees and their predecessors allowed the legal title, if they had any say in the matter, to rest in E. B. Dean & Co. and in C. H. Merchant as receiver. Merchant as receiver showed Dillman over the property, told him it was the property formerly belonging to E. B. Dean & Co.; that he had title to it as receiver; that the raftsmen had leased it for five years, and that they were to pay a certain rental according to the amount of logs they sent through. This is far from being a recognition of the

rights of ownership of appellees. Merchant, as receiver, sold the entire property to the Dean Lumber Company, and that company clearly not only did not recognize any rights of ownership in the raftsmen but expressly repudiated any such claims. All of the testimony in the record is analyzed, with proper references to the printed record as required by the rules of this court, in our main brief, pages 44 to 69, and shows conclusively that the alleged rights of ownership *were never recognized,* and yet counsel for appellees dispose of this overwhelming evidence with the brief assertion that the rights of ownership of the raftsmen were recognized and were acquiesced in by E. B. Dean & Co., through their "authorized" receiver, and the Dean Lumber Company.

Having satisfied themselves that appellees must have some rights of ownership, counsel for appellees next advance the proposition that C. A. Smith was not an innocent purchaser because the raftsmen were in possession of the boom at the time he purchased it. Before leaning too strongly on this prop it would seem to be incumbent on them to establish that the raftsmen were in possession. As we have seen, the Dean Lumber Company purchased the property from the "authorized receiver" of E. B. Dean & Co. The Dean Lumber Company expressly refused to recognize the rights of ownership claimed by the raftsmen, put permitted them to operate the boom and carry on their rafting business. That is to say, they did continue to carry on their rafting business;

the Dean Lumber Company had no control over that part of it. Anyone could or can tow rafts about the bay subject only to laws governing same. Now the raftsmen clearly were not in possession as owners of the boom at any time while it was owned by the Dean Lumber Company. Such "possession" as they may have had was that of workmen only, the same kind of possession a house painter would have of a vacant house he was painting for the owner. The arrangement under which they had "possession" was as stated by the witness Squires and others, a working arrangement only, and the Dean Lumber Company expressly refused to recognize any rights of ownership. (See appellant' brief, pp. 45, et seq.) No case is or can be cited to sustain the contention that such possession as this can defeat the title of an innocent purchaser for a valuable consideration.

At page 67 of their brief, appellees cite the following text from Cyc.

> "A tenant in common cannot enforce contribution if he asserts ownership of the entire title as against his co-tenants."

We quite agree with this statement of the law so far as it goes. Appellees council have forgotten to add the text appearing on the next page, as follows:

> "Conversely, if he is to be called upon for an accounting of the rents and profits, he is to be allowed for advances properly and reasonably made by him for repairs and improvements."
>
> 38 Cyc 59.

The position taken by counsel for appellees is most inequitable and inconsistent. They assert, and, as we have seen, it is but a bare assertion, that the date of ouster was June, 1909, and the court below allows them to share in the profits for the logging season of the winter of 1908-1909. Mr. Powers said to them in the fall of 1908:

> "I tell you right here that you haven't anything more to do over there" and "said that they had no interest in the booms." (Bernitt's testimony, Tr. pp. 151-152.)

and the Smith Powers Logging Company was then in actual possession of the boom (Ingram's testimony, Tr. p. 233; Varney's testimony, Tr. p. 260). Our position is that at this time, in 1908, there was a complete ouster, if ever.

> "Ouster may be proven by a claim of exclusive right accompanying possession, as where the adverse character of the possession of the one is actually known to the others.
> 38 Cyc. 32-33.

Now if we took this position and tried to enforce contributions after such an ouster, we would not be permitted to do so, but if there was no claim "of the entire title" at that time, and if there was no ouster at that time, as is held by the court below and maintained by counsel for appellees, then the court which says there was no such claim and no such ouster should compel appellees to contribute for the winter of 1908-1909, that is, up to the time when the court

holds there was an ouster. They cannot claim in one breath that appellants asserted "ownership of the entire title" and therefore are not entitled to contribution, and in the next breath assert that there was no ouster until some imaginary date in 1909, and claim a share of the profits up to that time.

At page 74 of appellees' brief, they apparently concede the correctness of the rule of law relied on in our main brief, that if a partnership ever existed, the appellees ratified the sale by Merchant, as re er, to the Dean Lumber Company, and cannot no.. question the subsequent transfers. They say, however, that the rule does not apply in this case because there is no evidence that appellees knew when the sale to Dean Lumber Company was being made or was made until after conveyance passed. There is plenty of testimony in the record to show that they knew of the sale at or about the time it was made (Appellants' brief 37 to 43) Bernitt testified that he told Mr. Squires, manager for Dean Lumber Company, that if he had E. B. Dean & Co.'s old books,"he could prove their claims to the booms." (Tr. p. 166). The Dean Lumber Company was the owner of the property from 1903 to 1907, (Tr. p. 464) yet during all that period of four years the appellees asquiesced in the sale to the Dean Lumber Company, at least they took no steps to question it. Does not their conduct amount to a ratification of the sale by the "authorized receiver" to the Dean Lumber Company?

But that was not the opportune moment to make their claims. At that time "the boom wasn't kept up, was *depreciating all the time, getting a little worse and a little worse, and not only on account of the boomsticks rotting out faster than they were replaced, and the chains, but the boom itself was filling up rapidly on account of drift.* (Tr. p. 271) Bernitt talked these matters over with Squire the manager for the Dean Lumber Company, "*there was apparently a crisis coming as to whether they could use the booms at all or not and they were being forced by other parties who were kicking, that the booms occupied the channel and there seemed to be no permit from the Government; that they seemd to be using it by common consent and frequently people were objecting because the channel was being blocked, and they were interfering with the boom;* ********** *they didn't suppose they could obtain a permit from the Government to use the booms that way.*" (Tr. p. 278).

When Mr. Smith bought the boom "*of course it had seen its day at that time.*" (Tr. p. 282.) It is apparent that it was hardly worth while to make any claims of ownership in the boom at that time, even had any such rights existed. It was much better to stand by and allow the Smith-Powers Logging Company to expend thousands of dollars in repairs and extensions, get the absolutely necessary Government permits, and put the boom in condition to handle

logs, and then make their claims of ownership. It is obvious that the boom itself was practically worthless when it was taken over by Mr. Smith and the Smith-Powers Logging Company. The chief value was in the *tide lands* on which the boom was constructed. Appellees admit in their brief that they have no ownership of the lands themselves. But the court below found that the booms were worth $2,000 and said that little value could be attached to the tidelands, the valuation of $2000. being apparently arrived at by taking the amount the Logging Company paid (Tr. p. 82) for the boom *and the tide lands.* It appears from the complaint itself that these tidelands consisted of 21.62 acres. (Tr. p. 4.) The testimony abundantly shows the market value of these and similar lands. For lands immediately adjoining these lands, the logging company paid $50. an acre, which was a very reasonable price; adjacent lands of the same character had sold for $100. an acre; (Tr. p. 352) ; the company paid $2500. for Holland Island, consisting of about 20 acres (Tr. p. 389). So that the lowest price for which any similar lands sold was $50. per acre. It would seem therefore that this was a reasonable valuation to place on the 21.62 acres mentioned in the complaint, and at $50. an acre this would amount to $1081. Deducting this from the sum of $2000, would leave the value of the boom itself $919. and appellees alleged half-interest would be $459.50. Furthermore, the court below found that the general Government required the booms to

be so changed in part as to leave a portion of the channel of Coos River open and free to navigation. "This requirement imposed a large amount of expense for reconstruction (Tr. p. 82). So that even if we jump to the conclusion that appellees owned a one-half interest in the boom, and that is the only way one can reach such a conclusion, the record is clear that the boom itself, excluding the tidelands, was worth less than nothing, because it was in a dilapidated condition, had "seen its day," and had to be re-constructed at great expense to meet the government requirements or its use discontinued. Yet the appellees are awarded the sum of $1000 as the value of a half interest in the boom.

It is argued at pages 84 and 85 of appellees' brief that the rule cited by us that there can be no prescriptive right to maintain or continue a material obstruction to navigation does not apply for the reason that appellees are not claiming under a prescriptive right but under a contract. Perhaps we should have explained more fully that our conception of the rule is that there can be no vested rights, such as claimed by appellees, which will permit anyone to obstruct the navigable waters of the United States contrary to United States laws, and for that reason alone *the boom was practically valueless until reconstructed at large expense.* In passing, it is interesting to note that so near the close of their brief (page 85) appellees state that their claim is *"based on contract."* As for the authorities cited on page 86 of their brief

we are at a loss to follow the reasoning or understand just what they are driving at, unless it be that they are trying to prove that the Smith-Powers Logging Company, having gone ahead and obtained the necessary permits from the Government and reconstructed the boom in accordance with the government requirements, should share with the raftsmen the benefits and profits without asking them to shoulder a share of the burden.

And appellees say "in conclusion" at page 87 of their brief that:

> *"The main question in this case is whether Smith had notice or was bound to take notice of appellees' claims at the time of the purchase."*

They then assert that appellees were in actual possession at the time the transfer took place, February, 1907, and refer to Smith's testimony at pages 219 and 222 of the record and to Bernitt's testimony at pages 146 and 449. Let us examine this "main question" and the testimony referred to. Smith testified at page 219 that he purchased the boom in February, 1907, from Mr. Dillman, representing the Dean Lumber Company, the bargain being made in Sacramento, that he had previously seen the boom as he passed by in a launch and that was the only knowledge he had of the boom except the statement of Mr. Dillman that they had a boom there which they had maintained for many years and that it was part of the assets of the Dean Lumber Company; that wit-

ness understood at the time of the purchase that the Dean Lumber Company was the absolute owner of the boom the same as it was of all the other property which they sold and deeded to him. And at page 222 he testified that when he passed by the booms in a launch some two months before he purchased them he did not notice anyone working at the booms or whether there were any logs in them. Now what is there in this testimony to show that Mr. Smith "had notice or was bound to take notice of appellees claims" or that "appellees were in actual possession?"

Bernitt testified at page 146, referred to by appellees, that "the plaintiffs had possession of the boom up to the spring of 1908 and *considered* that they owned a half interest in it, and considered that it was theirs yet." Now it is manifest that this is a mere conclusion of the witness. The kind of possession we are considering and the kind appellees must prove is not to be established by the bare assertion of Bernitt. The fact that he "considered" they had a half interest has no probative force whatsoever. He further testifies that the plaintiffs kept the boom in repair, operated it, etc. and were rafting logs in 1906 and 1907 and were at the boom rafting logs the entire month of February, 1907, *"that is making up rafts and towing them away."* We concede all this; we concede that the raftsmen were rafting about the boom during these periods; we concede that they operated the boom; but they were doing so under a

working arrangement such as testified to by Squire, Dillman, Phelan, W. T. Merchant and others who were in control and management of the Dean Lumber Company at that time. W. T. Merchant was one of the plaintiffs' own witnesses; he was a son of C. H. Merchant, the "authorized receiver" of E. B. Dean & Co. Merchant testified that he was manager of the Dean Lumber Company for four years and had charge of its entire business on the Bay, including the charge and control of the boom, and:

> "*That during that time he did not recognize or deal with any one else as having any ownership or interest in these booms.* That there was no question but that he would have known of it if the Dean Lumber Company had so dealt, and he did not know of its doing so; that he never understood that there was any understanding *as partners* between Bernitt and the Dean Lumber Company." (Tr. p. 300)

Mr. Dillman, president of the Dean Lumber Company, testified:

> "That the first he heard of any claim by the plaintiffs was after the property was sold to Mr. Smith; that absolute ownership was claimed by the Dean Lumber Company, and no one else had title to it as far as the witness knew." (Tr. p. 465.)

To the same effect see the evidence on this subject collected and analyzed at pages 44 to 54 of appellants' brief. This was the kind of "possession" the

plaintiffs had, that of raftsmen working around the boom and operating it, but not under any claim of ownership. The other testimony of Bernitt cited by appellees, at page 449, makes no better showing. The utmost that can be said of this testimony is that it shows the raftsmen were working in and around the boom. The question which naturally presents itself is—Why did not Bernitt or Wittick, or some other witness testify to facts tending to show that appellees had possession under a claim of ownership, or at least part ownership? The answer is obvious.

At the argument the question arose as to why the plaintiffs continued to work around the booms after they were told in 1908 by Mr. Powers that their claims would not be recognized, and counsel for appellees earnestly insisted that they were endeavoring in good faith to carry out their contract. What was going on at the boom from August, 1908 up to Christmas, 1908? Willis Varney was in charge of the boom during that period; "that during that time they were engaged in building new booms and repairing the old ones;" (Tr. p. 260) "that during that summer and fall he built a new boom from the head of the Cut-off to the foot of the Old Boom splitting the channel" (Tr. p. 260). We understand that the alleged contract which plaintiffs were endeavoring in good faith to carry out at the time required plaintiffs to bear half the labor and expense of repairing the boom. Were they endeavoring in good faith to comply with that provision of their alleged contract? If

so, where in the record have they established that fact? And after Christmas, 1908, when Ingram was in charge for the Smith-Powers Logging Company, did the plaintiffs endeavor in good faith to assist in the repairs? Ingram says they did not. He says he was there during all the rafting season of 1908-1909; that Mr. Bernitt and Mr. Wittick

> "didn't aid in repairing the boom, but did help make up rafts occasionally and tow them away to North Bend or Marshfield whenever the occasion offered; that in some places it is customary for the raftsmen engaged in towing to help make up the rafts and in some places not; that some of the raftsmen aided here and some did not, but that it is customary for them to help; that the plaintiffs did some work making up rafts but didn't open the sheers or open the booms, or do anything of that kind to witness' recollection excepting that he saw Mr. Bernitt closing the sheer boom one time when the witness was working above." (Tr. p. 237.)

That is what the plaintiffs were doing at the boom during the logging season of 1908-1909. They were rafting the same as were other raftsmen. They were not endeavoring in good faith to comply with their alleged contract in any of its terms.

We all know that long and intimate association with an article of property easily germinates the idea of ownership. Bernitt and Wittick had rafted

around this boom for many years, part of the time we concede they were operating it under a working agreement of some kind. Let us give them the benefit of the doubt and say that the rafters did not intend to become grafters, but sincerely believed from their long association with the old boom that they surely must have some kind of proprietary rights in the fine new boom which the Smith-Powers Logging Company built. Bernitt, as we have seen, even "considered" that they had and still have a one-half interest, but that is as far as he is willing to go. Neither he nor any other witness would testify that the agreement, original or otherwise, provided that the rafters were to have any rights of ownership. This we are asked to presume from the fact that the old books of E. B. Dean & Co. charged the raftsmen with a portion of the cost of construction in the "boom account." And we are asked to presume that their occupancy of the boom as raftsmen under this working arrangement established such legal possession as to defeat the rights of an innocent purchaser for a valuable consideration and compel him to pay twice for the same property, and at a valuation far in excess of its proven worth.

The decree of the court below should be reversed on the facts alone.

Respectfully sumbitted

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